

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION TWENTY-FIVE

Indianapolis, IN

STEEL WAREHOUSE CO., INC.  
Employer

and

Case 25-RC-10235

INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, LOCAL 364, a/w  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS  
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held April 19, 2004, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.<sup>1</sup>

I. ISSUES

International Brotherhood of Teamsters, Local 364, a/w International Brotherhood of Teamsters (the "Petitioner") seeks an election within a unit which includes all Outside

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<sup>1</sup> Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Dispatchers, Backhaul Coordinators/Dispatchers, and Window Dispatchers, employed by Steel Warehouse Co., Inc. (the "Employer") at its South Bend, Indiana facility. The Employer, however, contends that employees employed in these positions should not be included in the unit because they are supervisory employees within the meaning of Section 2(11) of the Act. The petitioned unit, as amended at hearing, consists of one Outside Dispatcher, one Backhaul Coordinator/Dispatcher, and three Window Dispatchers (collectively the "dispatchers"). A sixth dispatcher position exists called the "Inside Dispatcher," which was included in the Petitioner's original petition. However, at hearing the parties stipulated that the Inside Dispatcher is a supervisor within the meaning of Section 2(11) of the Act. The parties did not, however, place into the record any facts in support of this stipulation. Therefore, the stipulation alone does not resolve the unit placement of the Inside Dispatcher. The Board is not bound by a stipulation of the parties which may contravene the Act Rosehill Cemetery Association, 262 NLRB 1289 (1982); A & B Cartage, 256 NLRB 14 (1981). The parties have otherwise agreed upon the composition of the appropriate bargaining unit.<sup>2</sup>

## II. DECISION

For the reasons discussed in detail below, including the Employer's failure to demonstrate that its dispatchers assign and responsibly direct employees, discipline employees, adjust employee grievances, or effectively recommend such actions with the requisite degree of independent judgment, it is concluded that the Employer's dispatchers are not supervisors within the meaning of Section 2(11) of the Act. It is also concluded for reasons discussed infra, that the Outside Dispatcher and the Backhaul Coordinator/Dispatcher are not managerial employees, as contended by the Employer. Therefore, they are included in the petitioned unit. Furthermore, it is concluded that since the evidence is insufficient to make reasoned findings and conclusions concerning the proper unit placement of the Inside Dispatcher, she shall be permitted to vote subject to challenge, and her voting eligibility shall ultimately be determined, if necessary, in post-election proceedings.

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time dispatchers, including Window Dispatchers, Backhaul Coordinators/Dispatchers, and Outside Dispatchers,<sup>3</sup> employed by the Employer at its South Bend, Indiana facility; BUT EXCLUDING all office clerical employees, all payroll department employees, all billing clerks, all employees

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<sup>2</sup> The Petitioner amended its Petition at hearing to exclude the position of Billing Clerk and both parties stipulated to this amendment.

<sup>3</sup> In light of the ruling herein that the Inside Dispatcher shall be permitted to vote in the forthcoming election subject to challenge, the unit's description shall not be modified to include the Inside Dispatcher position until such time as a determinative decision is made in post-election proceedings that the position should be included in the unit.

represented under existing collective bargaining agreements, and all guards and supervisors as defined in the Act.

The unit found appropriate herein consists of approximately six employees for whom no history of collective bargaining exists.

### III. STATEMENT OF FACTS

#### A. Overview of Operations

The Employer operates a flat-roll steel processing business in South Bend, Indiana. Its operation involves four buildings. A production building and warehouse are located within two blocks of each other, and machining the steel products is performed in a third building located approximately four miles from the production building. The dispatchers work in a fourth structure located about 100 yards from the production building. The four buildings are jointly referred to herein as the Employer's "facility." The Employer's approximately 220 production and maintenance employees are represented by IUE-CWA Local 809.<sup>4</sup> The Employer's approximately 36 truck drivers, 10 leased drivers, and 9 mechanics are represented in two separate units by the Petitioner. The Employer ships as many as 150 truckloads of product per day, and therefore contracts with outside carriers to transport many of its shipments, as well.

#### B. Transportation Department

The purpose of the Transportation Department is to timely transport product from the Employer's facility to customers, and to transport materials from suppliers to the Employer's facility. A Director of Transportation is the highest ranking member of management in the department. Prior to assuming this position the Director held the position of Human Resource Manager for the Employer. A Fleet Operations Manager directly reports to the Director. Both the Director and Fleet Manager play an active role in the day-to-day supervision of the Employer's Transportation Department. In addition to the six dispatchers whose unit placement is in dispute, the Department is comprised of drivers, a billing clerk, a clerical employee who handles payroll, and a clerical who handles safety and compliance, for a total of 45 to 50 employees. The Employer contends that in addition to the Department Director and Fleet Manager, its six dispatchers also supervise its drivers.

The Transportation Department utilizes a computer program called "Reflections" to track shipments in and out of the facility. Both the Sales and Purchasing Departments initiate entries about customer orders into Reflections, including information about the date and location where a shipment is to be delivered, as well as the location where materials or supplies are to be picked up from vendors and transported to the Employer's facility. Production managers in the manufacturing plant update information in the Reflections system to indicate the date product will be ready for shipment. Certain individuals in the Sales and Purchasing Departments are

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<sup>4</sup> The record contains only the initials of Local 809, and not the full name of the union.

authorized to enter a priority rating for each shipment. Shipments are initially categorized as priority 1, the highest, or priority 3, the lowest. A priority 3 that is not shipped the first day it is placed on the shipment board is re-categorized as a priority 2 the next day.

Based upon the information in the Reflections program and policies established by the Employer, the Inside and Outside Dispatchers determine which shipments will be handled by the Employer's drivers ("inside drivers") and which will be contracted to outside carriers ("outside drivers"). Included among the parameters established by the Employer for determining which deliveries will be made by inside versus outside drivers are: distance to delivery location; amount of time to transport the shipment; whether the driver is likely to return to the facility in time to make another shipment the next day; the likelihood of securing a backhaul located near the delivery location; Department of Transportation ("DOT") Regulations; and the availability of permits for oversized or overweight loads. One of the objectives of not only the Inside and Outside Dispatchers, but the Backhaul Coordinator as well, is to reserve shipments for the inside drivers which maximize the drivers' income. Thus, although the dispatchers' selection of routes and backhauls for the inside drivers are circumscribed by Employer policies, within those parameters the dispatchers seek to select the most lucrative routes and backhaul deliveries for inside drivers. For example, it appears that the road drivers are paid based upon mileage of delivered shipments, and not by the hour. In addition, they are not paid for the time it takes them to drive an empty truck to a backhaul<sup>5</sup> pickup site or back to the Employer's facility. Therefore, the Inside Dispatcher seeks to select deliveries for the Employer's drivers which, in addition to the income earned for making the delivery, will enable them to earn income from the backhaul of product.

After the decision is made whether a shipment will be transported by an inside or outside driver, the shipment is placed on one of six Reflections computer-generated menu screens, which are referred to as "boards." The boards are posted each day for the next day's deliveries. Pursuant to their respective collective-bargaining agreement's provisions, on Friday of each week, the inside drivers select a delivery route from the routes posted on the boards, for delivery the following Monday. Drivers select these routes based upon years of service seniority. The following week, after the drivers return to the facility from their first delivery of the week, they sign a sign-up board and are allowed to select their next route from the boards, based upon sign-up seniority (i.e. first driver in/first driver out). Drivers can run as many routes in a week as they have driving hours available pursuant to Department of Transportation regulations. Drivers are categorized as over-the-road drivers, city drivers, or "percenters" (drivers who haul both city and road deliveries), by either the Director or Fleet Manager, pursuant to the terms of the collective bargaining agreement governing the drivers.

Although the Employer and dispatchers state that dispatchers assign routes to drivers, the use of the word assign is misleading. The drivers, based upon their categorization as an over-

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<sup>5</sup> Backhauls are loads which a driver picks up on a return trip to the Employer's facility. The backhaul loads may be delivered to another company or to the Employer. Generally, drivers are dispatched to pick up a backhaul if it lies within a certain proximity to the route the driver will use to return to the Employer's facility.

the-road or city driver, select routes from the appropriate boards in succession, based upon either service seniority or signup seniority. The routes are listed on one of six boards: a Dollar Board from which over-the-road drivers select routes based upon a first-in and first-out basis; an Extra Board which is comprised of short runs for drivers with less than 650 miles of driving time remaining in a given week (but who want more work); a Layover Board for multi-task hauls including backhauls; a City Board for city drivers; an Outside Board for contracted carriers; and a Process Board for unusual shipments which require a special outside carrier. After a driver selects a route, a dispatcher prepares the appropriate paperwork for the shipment, and performs other clerical tasks to assist the driver to depart with the shipment on a timely basis.

### C. The Dispatchers

The Employer employs six individuals in four different dispatch positions. Four dispatchers work first shift: an Inside Dispatcher; an Outside Dispatcher; a Backhaul Coordinator/Dispatcher; and a Window Dispatcher. Two additional Window Dispatchers work second and third shifts, respectively. All of the dispatchers work in a freestanding structure that is apparently located next to the truck scale. A Billing Clerk and two Payroll Clerks also work in the same building. Their direct supervisor, the Fleet Manager, and his supervisor, the Director of Transportation, maintain offices in the production facility about 100 yards away from the dispatch building. The dispatchers communicate with each other, management, and other departments, via telephone, e-mail, and facsimile. The dispatchers also communicate with drivers via telephone and e-mail.

All of the dispatchers are hourly employees who punch a time clock. The third shift Window Dispatcher earns \$10.97 per hour plus a \$0.35 shift differential, while the Backhaul Coordinator earns \$11.00 per hour. The record does not identify the wage rates earned by the other dispatchers, but the Transportation Director testified that all the dispatchers' hourly wages are similar, with some adjustment for years of service. The dispatchers receive the same benefit packages and holidays as the Employer's other employees including unionized employees.

It is an established practice that each dispatcher sends an e-mail at the end of her shift to all of the other dispatchers and to management personnel noting any significant occurrences on her shift, absences or tardiness, and changes in drivers' routes. Likewise, at the beginning of each shift the dispatchers receive e-mails from the other dispatchers and note any changes that may affect their shift.

#### 1. The Inside Dispatcher

As mentioned previously, the parties stipulated that the Inside Dispatcher is a statutory supervisor without stating a factual basis for the stipulation. A review of the evidence concerning the duties, responsibilities and authority of the position suggest that it does not meet the strictures of Section 2(11) of the Act. The parties did not submit direct evidence concerning the duties and authority of the Inside Dispatcher, perhaps because they believed the undersigned would adopt their stipulation. As mentioned previously, the Board is not bound by a stipulation of parties where the stipulation may contravene the Act.

The Inside Dispatcher and Outside Dispatcher work together to determine upon which board a route is placed. Although not explicit, the record indicates that the Inside Dispatcher makes the ultimate decision about which routes are placed on which board. It is clear that the Inside and Outside Dispatchers utilize data that has been entered into the Reflections computer program, but it is unclear whether the program provides computerized assistance in developing and/or prioritizing the routes. The Outside and Inside Dispatchers consider the following factors to determine on which board each route is placed: routes that will maximize the inside drivers' pay since they are paid based upon mileage, not by the hour; the distance of the delivery from the facility, usually with a cutoff for inside drivers of 500 miles; the need for a driver to stay overnight; inside driver's availability to perform another route the next day; and the type of load (i.e. oversized or overweight).

The Inside Dispatcher also maintains records of each driver's eligibility to drive. In one situation involving a driver who needed to present a medical fitness release in order to return to work, the Inside Dispatcher left instructions for the third shift Window Dispatcher concerning how to deal with the situation. The third shift Dispatcher was told that if the driver presented the release to her, she should reassign the driver who had been replacing the driver on sick leave, to his original work of hauling scrap material, and return the driver returning from sick leave to his former driving duties. The record is unclear whether the Inside Dispatcher made these decisions or whether she was relaying a decision made by a superior.

The Inside Dispatcher regularly leaves notes for the Window Dispatchers about how specific shipments, drivers, permits and other issues should be handled. On one occasion the Inside Dispatcher disagreed with a decision the third shift dispatcher made to change the way the Inside Dispatcher had configured certain routes by adding more weight to one truck, thereby eliminating the need for a second truck. In response, the Inside Dispatcher admonished the third shift dispatcher and explained that combining the loads onto one truck caused the truck to exceed Michigan weight restrictions.<sup>6</sup> The record does not indicate whether this verbal counseling constituted any form of discipline, or whether it was recorded by the Employer.

According to the Backhaul Coordinator/Dispatcher, she had previously worked from 6:00 A.M. to 3:00 P.M. although the regular first shift hours are from 7:00 A.M. to 4:00 P.M. Her hours were subsequently altered to comport with those of her co-workers. The Backhaul Coordinator presented hearsay testimony that it may have been a complaint registered with the Fleet Manager by the Inside Dispatcher which prompted this change in her hours.

Although the job description for the Inside Dispatcher position states that individuals employed in the position will assist in the investigation of grievances, the record is mute as to whether the Inside Dispatcher has ever played a role in the investigation, processing, or adjustment of grievances.

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<sup>6</sup> Apparently the delivery was destined for a location in Michigan.

## 2. The Outside Dispatcher

As discussed above, the Outside Dispatcher works with the Inside Dispatcher to determine which deliveries shall be made by inside drivers and which deliveries shall be delivered by outside carriers. When a determination is made that a load will be transported by an outside carrier, it is the Outside Dispatcher's responsibility to locate and contract with a common carrier. Some of the deliveries the Outside Dispatcher hires, may actually be backhauls for other companies' drivers. At times the Outside Dispatcher will arrange backhauls for outside carriers in order to make contracts to haul the Employer's shipments more attractive to the outside carriers.

According to the Director of Transportation, the Outside Dispatcher has the authority to establish the rates for outside contracts, and regularly exercises it. The Director testified that the Backhaul Coordinator possesses the same authority, but the Backhaul Coordinator testified that she has no such authority. The Backhaul Coordinator testified that she makes arrangements for contracts for the inside drivers to backhaul for other companies, but that the Fleet Manager must authorize the rates received for these backhauls. Thus, it is unclear whether the Transportation Director was mistaken concerning the Outside Dispatcher's authority to establish rates. Even if the Outside Dispatcher possesses the authority to agree upon rates for the outside carriers, she bases these rates on established business standards and past experience, and the rates paid to outside carriers do not affect the wages, hours, or terms and conditions of the Employer's employees.

There is no evidence that the Outside Dispatcher possesses the authority to discipline or has effectively recommended the discipline of employees; nor does the record indicate that she has ever participated in the investigation, processing, or adjustment of grievances.

## 3. The Backhaul Coordinator/Dispatcher

As the title connotes, the duties of the Backhaul Coordinator are centered around arranging backhauls for the inside drivers. Her responsibility is to match the inside drivers' delivery points for loads leaving the Employer's facilities with the pickup locations of backhauls. Because the drivers are only paid for loads delivered, and it is an expense for the Employer to operate a truck on a return trip without making any revenue from that trip, it is the Backhaul Coordinator's job to locate backhauls to maximize drivers' incomes and avoid extra expense for the Employer.

The Backhaul Coordinator receives daily facsimiles from the Purchasing and Sales Departments listing backhauls or hauls between two outside points. The backhauls are prioritized by the Purchasing and Sales Departments based upon when the materials/supplies are needed for production or by other customers. The Coordinator compares the pickup locations for the backhauls to the delivery locations for the loads listed on the inside board. She schedules backhauls based upon the priority of a load and the proximity of the pickup location to a drop-off location. The Coordinator testified that she assumes that all drivers are capable of dealing with any backhaul and does not take into consideration a driver's skill or ability when matching a

backhaul location with a drop-off location. The Coordinator uses a computer program called Prophecy to coordinate drop-off and pick-up locations within 150 miles of each other. If a backhaul is not within 150 miles of any drop-off, she may postpone having the backhaul picked up. If the backhaul is high priority and is outside the 150-mile radius, she contacts the Outside Dispatcher to see if an outside carrier can transport the backhaul. Some of the backhauls that the Coordinator arranges for the inside drivers are for other companies that contact her soliciting drivers to transport loads for them. As discussed above, the Coordinator makes the initial arrangements for outside backhauls, but it is the Fleet Manager who approves the rates at which the backhauls will be performed.

The Backhaul Coordinator communicates regularly with drivers. The drivers either call or e-mail her after they have delivered their outgoing loads in order to find out whether a backhaul is available for them. Although the Coordinator assigns a backhaul to a driver, that assignment is based upon factors described above rather than the driver's training or abilities. If two drivers deliver to the same location but there is only one available backhaul in that area, the backhaul is assigned to the driver with the most years of service seniority or sign-up seniority.

If it comes to the Coordinator's attention that a driver is significantly behind on an outgoing route or has not run the route, she gives this information to the Inside Dispatcher who schedules the outgoing inside routes. If a driver refuses a backhaul, the Coordinator reports this to the Fleet Manager and he deals with the driver. The Backhaul Coordinator is not involved in any discipline nor is she asked to recommend any discipline in these or any other situations. The Coordinator testified that the Fleet Manager has told her to report any problems that she has with drivers to him. Although she testified that she has reported problems to the Manager, she is unaware of any consequences that have resulted from these reports, and she has never recommended disciplinary action, or been asked to make a recommendation.

The Coordinator also relieves the day shift Window Dispatcher for lunch and performs her duties described below during that period of time. At the end of her shift, the Backhaul Coordinator sends an e-mail to the other dispatchers and to management personnel listing the backhauls that she has scheduled, and noting any other significant events which occurred on her shift.

With regard to the processing of grievances, the Backhaul Coordinator testified that at management's request she has made copies of daily logs which she maintains in the normal course of her work, which document the identity of each driver who performed each delivery and backhaul. She believed that management intended to use this information to respond to information requests from the Petitioner, and to assist in defending grievances. She has never been involved in any manner in a grievance meeting.

#### 4. The Window Dispatchers

Window Dispatchers work first, second and third shifts respectively and their duties are virtually the same.<sup>7</sup> The only significant difference is that the Department Director and Fleet



Manager are present in the Transportation Department offices during the day shift. During the second and third shifts, the Department Director is available by cell phone, and the plant supervisor, production supervisor and two foremen for their respective shifts are available in the production facility to provide assistance.

The majority of the Window Dispatchers' work is performing routine paperwork. At the beginning of each shift, the Window Dispatchers distribute pre-printed manifests to the pre-loaders. The pre-loaders are drivers who move trucks around the facility and load them prior to the over-the-road or city drivers' arrival. The pre-loaders are responsible for insuring that the correct material/product is loaded on the trailers in the proper order for delivery, and that the weight of the loads are balanced. After a trailer is loaded it is moved to a designated parking lot and the Window Dispatcher is notified. The driver is notified by the dispatcher that the trailer is loaded. The driver inspects the trailer to be certain it has been properly loaded, hooks the tractor to the trailer, and takes the truck to the scale. The dispatcher then weighs the truck and prints out and gives the driver a bill of lading and any necessary permits. Window Dispatchers also weigh incoming trucks, collect paperwork from the drivers, and direct them to the unloading docks in an organized manner.

Upon occasion the scheduled routes do not work as planned and some adjustments must be made. For example, a Window Dispatcher may have to deal with a "did not make" which is the Employer's term for a failure to have product ready to ship at the scheduled time. Although the third shift Dispatcher testified that in these situations she "assigns" the driver a different route, the record reflects that she does not actually assign the route. Indeed, the driver selects a different route from one of the boards, and the dispatcher insures that it is loaded and prepared for departure. When an inside driver is absent or an outside driver is a "no-show," the third shift dispatcher enters a code into the Reflections program noting that a driver did not report for work, and informs the third shift plant supervisor and the third shift production supervisor of the situation. If the driver has not arrived within two hours, the dispatcher speaks to one of the third shift supervisors for instructions. If the load is a priority 3, the dispatcher is usually directed to re-key the load as a priority 2, and the load returns to the board to be selected by a returning driver. If the load is a priority 1, the dispatcher is usually directed to find someone to take the load. The third shift dispatcher offers the load to drivers who have finished their routes but still have a sufficient number of driving hours to make the delivery. If more than one driver is available to make the delivery, she offers the route to the driver that signed the board first. Since a driver can refuse the route, the dispatcher is not actually "assigning" the route to a driver. Another technique that the third shift dispatcher uses to secure a driver for a delivery is to move the delivery to the Dollar board, the board that inside drivers are to choose from first (if they have the hours to complete the route) upon return to the facility. Again, the drivers choose from the boards or other available loads pursuant to collective bargaining agreement provisions. They are not directed to make a specific delivery by the Window Dispatchers.

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<sup>7</sup> The Employer contends that the third shift dispatcher exercises more independent judgment than the other two dispatchers because the Transportation Department Director is not present during her shift, and most of the drivers begin their deliveries during the third shift.

The Employer submitted several e-mails into the record in an attempt to show that the third shift dispatcher and the other dispatchers actually assign work to drivers. Although the third shift dispatcher used the word assigned in the e-mails, as discussed above, she did not actually assign drivers to routes that they did not select. In one e-mail, she states that a driver brought her a medical release, and that she assigned him to drive routes that another driver was scheduled to perform, and had the other driver perform scrap haul routes. During direct examination the third shift dispatcher explained that she had received a note from the Inside dispatcher advising her to return the driver to his regular route upon receipt of a doctor's release, and to return the substitute driver to his former route (hauling scrap loads). Other e-mails that create the impression that the third shift dispatcher is directing changes in drivers' duties were similarly explained.

In addition to the e-mails concerning the assignment of routes, the Employer submitted e-mails from the third shift dispatcher and the other Window Dispatchers which report that a driver was or was not late for work. In these e-mails, the Window Dispatchers are simply reporting the fact that a driver was late or that some mechanical problem with the time clock occurred for city drivers, or that the computerized clock on the scale for over-the-road drivers caused a driver's records to read that the driver was late, when in fact the Window Dispatcher witnessed that the driver was on time. Although the third shift dispatcher acknowledged at hearing that she is aware that drivers receive attendance points for absences and tardiness that are not excused, she testified that she played no role in determining whether or not drivers received points. Supporting her testimony, the Director of Transportation testified that the Payroll Department makes the determination as to whether an employee's absence or tardiness is excused.

The third shift dispatcher also testified that since a new policy of having trucks pre-loaded was implemented shortly before the hearing, she has not recorded over-the-road drivers' tardiness to work. She discontinued the practice of noting if a driver was on the scale by a route's scheduled loading time, because now the drivers do not load the trucks; the pre-loaders perform that task. Her understanding was that the pre-loading system was implemented to reduce the number of allowable driving hours a driver used while the truck was being loaded. She testified that she asked management on more than one occasion how she was to determine if a driver was on time for work. Since she has not received instructions from management, she has not been reporting tardiness.

The e-mails that the Employer submitted cover a time frame of about one year. Three other notations from the e-mails are of interest. The first is discussed more thoroughly above, but it involved the third shift dispatcher's making a decision to combine two loads into one delivery, a decision she was later told by the Inside Dispatcher not to do because it caused the trailer to exceed DOT weight limits. This illustrates that the third shift dispatcher did not possess the authority to make such a decision. A second incident involved the third shift dispatcher's dealing with a driver who had become upset about the amount of time it took to load his trailer. She asked him to sit down and relax for a while before driving the route. After resting, the driver drove the route that he had originally selected to drive; therefore, his wages, hours and terms and conditions of work were at the best minimally impacted. The record contains no evidence that the driver was disciplined in any manner due to the incident. The third e-mail message involved

a driver reporting to work and informing the third shift dispatcher that the delivery that he was scheduled to make would interfere with a doctor's appointment that he had scheduled later that day. The third shift dispatcher stated in the e-mail that the driver was clearly sick but was fit to drive, and that she allowed him to drive a shorter route so that he could return to the facility for his doctor's appointment. Again, the record is unclear whether the third shift dispatcher directed him to take the shorter route, or simply offered it as an option which he accepted. The dispatcher's e-mail expressed her hope that her decision was acceptable to the Inside Dispatcher and to management, suggesting that she was unsure that she had the authority to agree to such an arrangement with the driver.

Pursuant to a Department of Transportation Regulation, the Employer required all of its "supervisory" staff, including the Window Dispatchers and Inside Dispatcher,<sup>8</sup> to attend a one-hour training program concerning ways to detect drug and alcohol abuse on the job. All three Window Dispatchers received this training and have been directed to detain any driver that they suspect of being impaired, since they are the individuals who have contact with each driver before and after they have completed a route. After detaining a driver, the dispatchers were instructed to contact a supervisor. In one such situation when the third shift dispatcher suspected that a driver had reported for work under the influence of alcohol, she contacted the Transportation Director by cell phone, and also contacted the third shift plant and production supervisors who arrived at the dispatch office within minutes. After reporting her suspicions that the driver was intoxicated to management, the dispatcher was not involved in the decision to send the driver for drug/alcohol testing. There is no evidence that any dispatcher ever has ever made a decision to have a driver tested for drug/alcohol impairment or has ever played a role in determining the appropriate discipline for such a rule infraction.

The Employer contends that the Window Dispatchers are required to participate in grievance investigations. The Window Dispatcher job description makes no mention of such a duty. Even the Transportation Director's testimony clearly infers that any participation by a Window Dispatcher in a grievance investigation would be in the role of a witness to an incident, the same as any employee who witnessed an incident. The record contains no evidence of a Window Dispatcher ever being involved in grievance investigations, processing or adjustments.

#### IV. DISCUSSION

##### A. An Overview of the Law Concerning Supervisory Status

To determine whether an individual is a supervisor within the meaning of Section 2(11) of the Act, the Board examines: (1) whether the individual has the authority to engage in any one of the 12 enumerated powers listed in Section 2(11) of the Act; and (2) whether the exercise of such authority requires the use of independent judgment. NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001); NLRB v. Health Care & Retirement Corp. of America,

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<sup>8</sup> The record contains no evidence about the Inside Dispatcher's authority to deal with a chemically impaired driver.

511 U.S. 571, 573-574 (1994). The twelve powers set forth in Section 2(11) of the Act in defining a supervisor are the authority to “hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly direct them, or to adjust their grievances, or effectively recommend such action.”

The burden of proof rests upon the party alleging that an individual is a supervisor. NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001); Bennett Industries, 313 NLRB 1363 (1994). A lack of evidence is construed against the party asserting supervisory status. The Board is reluctant to confer supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999). The Board has found that a particular indicia of supervisory status has not been established if the evidence is in conflict or otherwise inconclusive regarding that indicia. Phelps Community Medical Center, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisor authority. Sears Roebuck & Co., 304 NLRB 193 (1991).

#### B. The Inside Dispatcher

The Employer and the Petitioner stipulated that the Inside Dispatcher is a statutory supervisor, but did not submit a factual basis for the stipulation, or submit evidence about the dispatcher's duties and authorities. Although the testimony concerning other dispatch positions contains some evidence about the Inside Dispatcher's duties and authorities, this evidence is insufficient from which to make reasoned findings of fact and conclusions of law concerning her alleged supervisory status. Therefore, in order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Inside Dispatcher shall be permitted to vote subject to challenge, and her eligibility to vote shall be determined, if necessary, in post-election proceedings.

#### C. Supervisory Status of the Outside Dispatcher, Backhaul Coordinator/Dispatcher and Window Dispatchers

Since the Employer is the party asserting the supervisory status of the Outside Dispatcher, Backhaul Coordinator/Dispatcher and Window Dispatchers, the burden of proof rests upon it. The Employer has not asserted, nor has it provided any evidence that the dispatchers possess the authority to hire, transfer, suspend, lay off, recall, reward, promote, or discharge employees, or effectively recommend such actions. The Employer, however, contends that the dispatchers in each of these positions can assign work and responsibly direct employees, discipline and adjust employee grievances, or effectively recommend such actions. The Employer, however, has not met its burden of proof.

##### 1. Assignment and Direction of Work

The simple fact that a dispatcher directs or assigns employees' work does not constitute supervisory authority unless the dispatcher exercises independent judgment in deciding how to direct employees or assign them tasks. The assignment of employees to perform tasks or the making of routine decisions based upon an “Employer's set practice, pattern or parameters, or

based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition" of a 2(11) supervisor. Franklin Hospital Medical Center, 337 NLRB No. 132, slip op. at 9 (July 19, 2002). See also S.D.I. Operating Partners, L.P., 321 NLRB 111 (1996); Express Messenger Systems, 301 NLRB 651, 654 (1991); Bay Area-Los Angeles Express, 275 NLRB 1063, 1075 (1985). In this case, the Employer contends that the Outside Dispatcher, Backhaul Coordinator/Dispatcher, and Window Dispatchers exercise independent judgment in assigning drivers to routes, but the evidence fails to support this conclusion.

First, the Employer failed to present sufficient evidence that the Outside Dispatcher assigns and directs employee's work using independent judgment. Although the Inside and Outside Dispatchers determine which routes to place on each of the six route boards, their decisions are based upon factors such as mileage, location of the delivery site, amount of time to complete the route, likelihood of having a backhaul in the vicinity, any special requirements for the load, number of inside drivers' driving hours available, and DOT regulations. There is no evidence that the inside drivers' skill or ability is taken into consideration in making these decisions. Even were dispatchers to use factors such as drivers' skills to assign a particular driver to a particular route, the Board has found that assignments based upon such factors do not evidence the exercise of independent judgment in directing/assigning work. See Carry Companies of Illinois, Inc., 311 NLRB 1058 (1993). In this case, after routes are placed on the boards, the drivers are not assigned routes. They select routes from the boards based upon their seniority.<sup>9</sup> Beyond assisting in the initial assignment of routes to the boards, the Outside Dispatcher's job duties of finding outside carriers for the routes listed on the outside board and establishing rates for those routes do not effect the terms and conditions of Employer's employees. Thus, the record presents no evidence that the Outside Dispatcher assigns or directs the Employer's employees within the meaning of Section 2(11) of the Act.

Second, there is insufficient evidence that the Backhaul Coordinator/Dispatcher uses independent judgment in assigning backhauls to drivers. Backhauls are assigned to drivers based upon proximity to the drop off location of their outgoing deliveries, which the drivers selected based upon seniority. If more than one driver is scheduled to drop off a load at the same location, and is the same distance from a backhaul pickup site, the driver with the most seniority is given the backhaul assignment. Indeed, a senior driver has more control over whether or not a backhaul will be available to him than the Backhaul Coordinator/Dispatcher, by having first pick of the routes and choosing a route that drops off close to a frequent backhaul pickup site. The record contains no other evidence that the Backhaul Coordinator/Dispatcher directs or assigns employees' work.<sup>10</sup> Again, the assignment of work based upon set guidelines and routines does

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<sup>9</sup> Even if the dispatchers assigned routes to the drivers based upon seniority instead of the drivers selecting their routes, the Board has found that assigning duties based upon seniority does not require the use of independent judgment. Fisher Foods, 245 NLRB 685, 687-88 (1979).

<sup>10</sup> The Backhaul Coordinator/Dispatcher does arrange with outside carriers to deliver shipments that are outside the parameters established for the inside drivers, but as discussed above, arrangements for outside carriers do not affect the wages, hours, or terms and conditions

not necessitate the use independent judgment sufficient as required by Section 2(11) of the Act. Therefore, the evidence is insufficient to prove that Backhaul Coordinators/Dispatchers are statutory supervisors.

Finally, the evidence is insufficient to establish that the Window Dispatchers use independent judgment in assigning/directing employees work. The Employer contends that the Window Dispatchers exercise independent judgment in assigning routes when the prescheduled routes are disrupted due to absences or “did not makes.” Instead, the Window Dispatchers either offer routes to drivers based upon a driver’s available driving hours and seniority, or re-key the routes onto the boards to increase their likelihood of being selected by a driver. A driver may refuse an offered route or select another route from the boards. The same is true when the product for a scheduled shipment is not completed on time. The driver can accept an offered route that the dispatcher is trying to get covered or the driver can choose a route from the appropriate board. The Window Dispatchers assume that all the drivers are equally qualified to perform the work, and the dispatchers prepare the necessary paperwork for the driver to deliver the load.

The Employer also contends that three e-mails which it placed into evidence, demonstrate that the third shift Window Dispatcher exercises independent judgment in making assignments. One of these e-mails involved a driver returning to work with a doctor’s release. The dispatcher testified that she had been advised by the Inside Dispatcher how to handle this situation, and her e-mail simply notified the dispatchers and management of her actions. A second e-mail involved combining two shipments going to the same location into one route. The result was a load that violated weight limit requirements. The error was explained to the third shift dispatcher. This indicates that the dispatcher did not possess the authority to make such decisions. The third e-mail involved an employee that reported to the third shift dispatcher that he could not complete a route for which he was scheduled and be back in time for a doctor’s appointment. The Dispatcher assigned/allowed him to select a shorter route, and made a notation of the change in her nightly e-mail to management and the following shift dispatchers, indicating her uncertainty that the change was acceptable. Again, this is not evidence of authority to assign and direct employees’ work through the exercise of independent authority.

In other similar e-mails sent by the third shift dispatcher, she explained that she had been directed to take the actions mentioned in the e-mails by the plant or production managers on her shift, and was simply notifying the other dispatchers and managers of the events that had occurred. Notably, the Employer presented e-mails from a period of approximately one year and only had a few examples of possible incidents when the third shift dispatcher or the other Window Dispatchers may have altered established driver’s schedules without first receiving directions from either the Inside Dispatcher or some management representative. Isolated incidents of assigning work are not sufficient to establish supervisor status. See Masterform Tool Company, 327 NLRB 1071 (1999).

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of work of the Employer’s employees.

The Employer's reliance upon the Board's decisions in Spector Freight System, Inc., 141 NLRB 1110 (1963) and Liquid Transporters, Inc., 250 NLRB 1421 (1980), to contend that the dispatchers in this case are supervisors because they assign and direct drivers' work is misplaced. In both of those cases, the Board noted that not only did the dispatchers have control of the drivers in every aspect of their work, but possessed authority to exercise several other indicia of supervisory authority such as transferring employees, assigning overtime, disciplining employees or effectively recommending their discipline, and sending them home early, among others. The dispatchers in this case do not assign and direct drivers with the amount of independent judgment as the dispatchers in those cases, and as discussed more thoroughly below, do not possess other indicia of supervisory status.

Based upon the foregoing, it is concluded that there is insufficient evidence to establish that the Outside Dispatcher, Backhaul Coordinator/Dispatcher or the Window Dispatchers responsibly direct or assign employees within the meaning of Section 2(11) of the Act.

## 2. Discipline

The Employer contends that the Outside Dispatcher, the Backhaul Coordinator/Dispatcher and the Window Dispatchers discipline drivers. In support of this contention, the Employer submitted evidence that the Window Dispatchers were trained alongside the rest of its supervisors concerning methods to recognize an employee who is under the influence of drugs or alcohol. The Window Dispatchers are often the only employees that see a driver face-to-face. If a Window Dispatcher suspects that a driver is impaired, the dispatcher has been instructed by the Employer to detain the driver and notify superiors. There is no evidence that the dispatcher has ever played a role in determining whether to drug test or discipline a driver for drug or alcohol impairment. The only role the Window Dispatcher plays in dealing with a possible impaired driver is reportorial.

The Employer also placed e-mails into the record where Window Dispatchers noted whether the time-clock printout for a city driver (or the scale print out for an over-the-road driver) accurately reflected whether the driver was on time for work, or returned from a lunch break on time. Although the third shift dispatcher testified that she is aware that drivers receive attendance points if the Payroll Department determines that a driver's tardiness or absence was unexcused, the Window Dispatchers play no role in determining whether an employee ultimately receive an attendance point. The dispatcher further testified that she has not been reporting over-the-road drivers tardiness since the Employer recently instituted the pre-load system. According to the dispatcher, she discontinued reporting over-the-road drivers arrival times after the pre-load system was implemented because she had not received from management a new standard by which to report if an over-the-road driver was on time or tardy. In the past she simply observed if the drivers complied with the Employer's established rules. Clearly, the dispatcher was not exercising independent judgment to determine whether drivers were late.

The Employer also contends that Backhaul Coordinator/Dispatcher disciplined drivers when they refused to accept a backhaul that she had arranged for them. The Backhaul Coordinator testified that she only reported any such refusal to the Fleet Manager, and he

handled the situation. She also testified that she has never recommended or been asked to give a recommendation for discipline in these situations.

The Board has held that the completion of incident reports and noting drivers' attendance or the completion of work, is evidence that a dispatcher is functioning as an observer or a reporter. Without evidence that the dispatcher actually effectively recommended or issued discipline in conjunction with the reports, it cannot be concluded that the dispatcher exercised supervisory authority. See Carry Companies of Illinois, Inc., 311 NLRB 1058, 1064 (1993); Tucson Gas & Electric Company, 241 NLRB 181, 182 (1979) (oral warnings that are not included in employees' files nor have a significant effect on employees' job status are not a basis upon which to find supervisory status). Because the dispatchers in this case play no role in determining whether a driver is disciplined for the conduct they report, this evidence does not establish supervisory status.

Finally, the Employer submitted an e-mail from the third shift Window Dispatcher in which she explained that a driver was upset, and she had him rest for a few minutes to calm down before he left the facility to make his delivery. After resting for a short while, the driver continued with his scheduled route. There is no evidence that this incident resulted in further discipline or affected the driver's job status in any way. The authority to complete reports of what one observes does not confer supervisory status where the reports have no clear connection to disciplinary action or have any tangible affect upon an employee's job status. Green Acres County Care Center, 327 NLRB 257, 257-258 (1998). Since there is no evidence that the note concerning the driver being upset and delayed in starting his route had any actual impact upon his job status, it cannot be concluded that such actions on the dispatcher's part constitute an effective recommendation of discipline.

The record contains no evidence of a dispatcher actually issuing discipline; nor does the record contain evidence of a dispatcher recommending discipline. The two dispatchers who testified indicated that they had never given or been asked to give a recommendation concerning the discipline of another employee.

Based upon the above, it is concluded that there is insufficient evidence that the Outside Dispatcher, Backhaul Coordinator/Dispatcher and Window Dispatchers discipline or effectively recommend the discipline of employees within the meaning of Section 2(11) of the Act.

### 3. Adjustment of Grievances

The Employer also contends that the dispatchers' participation in the adjustment of grievances is an indicia of supervisory status. Although the job description for the Outside Dispatcher and the Backhaul Coordinator/Dispatcher state that one of their duties is to assist in the investigation of grievances, it is unclear from the record what this duty requires. The Window Dispatchers' job description does not list a similar duty. The record contains no evidence of any of the dispatchers participating in the actual processing or adjustment of grievances. The Backhaul Coordinator testified that she has made copies of documents which she regularly maintains as a part of her job, at management's request for the use in processing grievances, but she has never been involved in a grievance proceeding. From the evidence in the



record, the dispatchers' role in processing grievances appears to be that of a witness to events, just as any employee may be a witness to events. Accordingly, the evidence concerning the authority of dispatchers to adjust grievances is insufficient to establish supervisory status.

#### 4. Secondary Indicia

When there is no evidence that disputed individuals possess any one of the twelve primary indicia of supervisory status enumerated in Section 2(11), the presence of secondary indicia alone is not sufficient to confer supervisory status. Ken-Crest Services, 335 NLRB 777, 779 (1998); General Security Services Corp., 326 NLRB 312 (1998), enfd. 187 F.3d 629 (8<sup>th</sup> Cir. 1998). Therefore, factors such as a difference in compensation, supervisor/employee ratio, and the status of being the highest ranking employee on site, are not determinative in this case. Finally, there is nothing in the definition of "supervisor" found in Section 2(11) that implies that service as the highest ranking authority requires a finding that such an individual must be a statutory supervisor. Training School at Vineland, 332 NLRB 1412 (2000).

#### D. The Alleged Managerial Status of the Outside Dispatcher and Backhaul Coordinator/Dispatcher

In its post-hearing brief the Employer for the first time raises a contention that the Outside Dispatcher and Backhaul Coordinator are managerial employees because they "exercise discretion in the movement of freight" As referenced by the Employer in its brief, a managerial employee is one who possesses the authority to formulate management policies and who may exercise discretion even independently of established employer policy. NLRB v. Yeshiva University, 444 U.S. 672, 682 (1980). As the record abundantly demonstrates, however, all of the Employer's Dispatchers, including the Outside Dispatcher and Backhaul Coordinator, make dispatch decisions within guidelines and limitations established by upper management. No evidence exists that any dispatcher may ignore these limitations or independently develop new policies governing their dispatching functions. Accordingly, it is concluded that neither the Outside Dispatcher nor the Backhaul Coordinator/Dispatcher is a managerial employee.

#### E. Conclusion

Based upon the evidence described above, it is concluded that the Outside Dispatcher, Backhaul Coordinator/Dispatcher and Window Dispatchers employed by the Employer are not supervisors within the meaning of Section 2(11) of the Act nor managerial employees. Accordingly, Outside Dispatchers, Backhaul Coordinators/Dispatchers and Window Dispatchers shall be included in the unit found appropriate herein. It is also concluded that the evidence is insufficient to determine whether the Inside Dispatcher is a statutory supervisor, and therefore, she shall be permitted to vote subject to challenge and her ultimate voting eligibility shall be determined, if necessary, in post-election proceedings.

## V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the International Brotherhood of Teamsters, Local 364, a/w International Brotherhood of Teamsters.

## VI. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

## VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within

7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, **on or before May 20, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

#### VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by May 27, 2004.

SIGNED at Indianapolis, Indiana, this 13<sup>th</sup> day of May, 2004.

/s/ Rik Lineback

Rik Lineback  
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National Labor Relations Board  
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